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SUBJECT: TYMOSHENKO CHALLENGES RESULTS OF ELECTION IN COURT

REF: KYIV 235

Classified By: Ambassador John F. Tefft for reasons 1.4 (b/d).

Summary

1. (C) PM Tymoshenko announced February 13 that she would challenge in court as fraudulent the results of the February 7 second round of the Presidential election. Her chances to overturn the results are poor. Rather, the court filing, which Tymoshenko made in person February 16, appears primarily political: an effort to de-legitimize Yanukovych. The Central Election Commission (CEC) certified Yanukovych as winner on February 14. OSCE/ODIHR's observation mission to Ukraine maintains that Tymoshenko's cases lack evidence. The Rada voted on February 16 to hold the inauguration on February 25. The High Administrative court is expected to rule on the Tymoshenko campaign's allegations of fraud February 18. Tymoshenko's prospects for appealing a negative decision are not promising. The head of Yanukovych's election campaign told the Ambassador he does not expect Party of Regions to be able to take down the Tymoshenko-led coalition until after Yanukovych's inauguration, when Yanukovych will have more leverage. End Summary.

The Braided Lady Refuses to Sing

2. (C) Although we heard from various sources close to PM Yuliya Tymoshenko that she would concede the election after the Central Election Commission (CEC) announced its final results (reftel), Tymoshenko appeared on television on the evening of February 13, prior to the CEC's February 14 certification, to announce that she planned to challenge the February 7 presidential runoff results in court. During her speech she said that Party of Regions (Regions) candidate Viktor Yanukovych would "never be the legitimately elected President of Ukraine." Tymoshenko also claimed that she had clear proof that Regions had falsified between three to eight percent of the vote in the Crimean region and that more than one million votes "may have been falsified using various techniques" throughout Ukraine. Most troubling was her declaration that "individual OSCE observers" have expressed their willingness to appear in court with video footage and assessments that there was systematic fraud.

Tymoshenko Campaign "Stonewalling" ODIHR

3. (C) OSCE/ODIHR officials called Tymoshenko's statements of OSCE's support for her case "unfortunate" and baseless as far as they know. Ambassador Heidi Tagliavini, head of the OSCE/ODIHR election monitoring mission, tried three times to talk to Deputy PM Hrihoriy Nemirya on the phone after Tymoshenko's statement, but he was "too busy" to take her calls, ODIHR's senior legal analyst told us. Tymoshenko's campaign has ignored requests by ODIHR, including a letter from Ambassador Tagliavini, to see the evidence Tymoshenko and her legal team have been alluding to in their public

statements. ODIHR officials tell us they have been completely "stonewalled" by Tymoshenko's team since they characterized the election on February 8 as fundamentally meeting international standards.

Legal Argument "Clever" But Insufficient

¶4. (C) ODIHR's legal analyst conceded that Tymoshenko's legal argument is "clever," but added that in his opinion there is insufficient evidence for her to win her challenge at the High Administrative Court (HAC). Tymoshenko went in person to file the case on February 16. Thus far Tymoshenko's legal team has filed 46 challenges in the Kyiv Administrative Court of Appeals, citing the CEC's failure to consider complaints filed by Tymoshenko's "Batkivshchyna" (Motherland) party that certain District Election Commissions (DECs) refused to recount votes at some polling stations where Batkivshchyna allegedly witnessed fraud. According to ODIHR, the courts ruled in previous cases prior to the February 7 runoff that the CEC does not have the right "not to act," and thus these challenges make legal sense because Tymoshenko's team is not challenging the overall results of the election but rather the legality of the CEC's failure to rule on fraud cases prior to its certification of the election results.

¶5. (C) Tymoshenko's complaint at the HAC will consolidate these 46 complaints into one and ask the HAC to rule on the presence of fraud in these cases in the place of the CEC. Tymoshenko's team hopes that the HAC will decide to throw out the results in these cases, but ODIHR officials tell us that

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they do not believe this will work. The HAC has two days from the filing of the complaint to make a decision, which would be February 18 (since the complaint was filed on February 16). The Presidential Election Law renders HAC decisions "unappealable." Tymoshenko's final step, ODIHR tells us, would be to make an argument that because voters were treated differently by certain DECs, constitutional rights were violated and thus the process of the election is unconstitutional and should be considered by the Constitutional Court of Ukraine (CCU). This argument would be very difficult to make successfully, ODIHR officials add. Tymoshenko may struggle to get an appeal heard in the Constitutional Court given CCU Chairman Stryzhak's public statement on February 15 that there are no legal grounds to challenge the validity of the election results in any court.

Unlike 2004, Exit Polls, PVT & CEC Results Agree

¶6. (SBU) Unlike in 2004, when exit polls indicated that Viktor Yushchenko had won the second round while the official results declared Yanukovych the winner, the results of every published exit poll, local NGO OPORA's parallel vote tabulation (PVT) and the official certified results from the CEC all indicate that Yanukovych won. The results of the various exit polls, the PVT and those certified by the CEC are as follows:

Democratic Initiatives Foundation (partially funded by NED)

-- Yanukovych	48.7%
-- Tymoshenko	45.5%
-- Against All	5.5%

Inter Television (Two Polls)

SOCIS (Ukrainian Independent Polling Organization)

-- Yanukovych	49.5%
-- Tymoshenko	44.5%
-- Against All	6.0%

Ukrainian Sociology Service (USS) and FOM-Ukraine

-- Yanukovych	49.7%
-- Tymoshenko	44.6%

-- Against All 5.6%

ICTV Poll (Run by British Polling Firm GfK)

-- Yanukovych 49.8%
-- Tymoshenko 45.2%
-- Against All 5.0%

"Shuster Live" Political Talk Show

-- Yanukovych 48.7%
-- Tymoshenko 45.6%
-- Against All 5.7%

"National Exit Poll" (Run by KIIS, and Razumkov Center)

-- Yanukovych 48.4%
-- Tymoshenko 45.7%
-- Against All 5.7%

OPORA PVT

-- Yanukovych 49.6%
-- Tymoshenko 45.9%
-- Against All 4.5%

Official CEC Certified Results

-- Yanukovych 48.95%
-- Tymoshenko 45.47%
-- Against All 4.36%

The unanimous results of these independent polls further weaken arguments by Tymoshenko's team that Yanukovych's campaign used systematic fraud in order to win the runoff election.

Rada Approves February 25 Inauguration Date

17. (U) Tymoshenko's public statements and court challenges did not deter Parliament (Rada) from voting on February 16 to hold Yanukovych's inauguration on February 25. 238 MPs from Regions (172), Our Ukraine - Peoples Self Defense (15), Communists (27), Bloc Lytvyn (20), Bloc Yuliya Tymoshenko (1), and nonaligned (3) approved the date.

Senior Tymoshenko Advisor Pessimistic

18. (C) Deputy Justice Minister (and a Tymoshenko campaign legal advisor) Yevhen Korniyichuk told us February 15 that Tymoshenko's chances to overturn the election result were next to none. He had just left a Cabinet of Ministers meeting with her and described her as in the "most depressed

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state" he had ever seen. She had not yet come to grips with her defeat. Tymoshenko had been silent until February 13, he said, because she had no "Plan B." Tymoshenko's lawyers were divided about proceeding with the court cases but she insisted on going forward fundamentally for political reasons. She wants to delegitimize Yanukovych's victory and be able to claim to her base that she was not defeated. She is, he said, hung up on 2004 analogies -- which do not apply.

19. (C) Korniyichuk said that the Supreme Court had made clear it would not take an appeal. He also highlighted that the Constitutional Court Chairman had also said he did not see grounds to hear an appeal if Tymoshenko loses. Korniyichuk recommended that Tymoshenko not be too strident in the event the court rules against her; there is a chance, he said, that she will berate the court as a fraud and in Regions' pocket. He noted that the legal challenges may be fully concluded as early as February 18. He predicted that, if by some miracle the court voids the election and there is a third round, popular outrage would ensure that Tymoshenko would lose - and by more than in the second round.

Coalition Talks

¶10. (C) Ambassador met February 16 with Mykola Azarov, head of Yanukovych's campaign. Azarov was "as confident as one can be in Ukraine" that Yanukovych's inauguration would take place on February 25. He said it was far more difficult for Regions to form a new coalition than it was to fight Tymoshenko's fraud allegations. Regions would do everything it could to form a new coalition and avoid early parliamentary elections. He predicted that there would be no new coalition until after the inauguration, when Yanukovych would be in a stronger position to negotiate. He expects a new coalition to form within a week of the inauguration.

¶11. (C) Azarov complained how difficult it was to negotiate with the amorphous Our Ukraine - People's Self Defense (OU-PSD) bloc. Yanukovych's condition to coalition partners was that the coalition remain for two years. If they can't agree to that, Yanukovych would have to opt for early parliamentary elections. This would be unfortunate, Azarov said, since another four months in campaign mode could bring the economy to full collapse. As for the Prime Minister in a new coalition, Azarov did not assert, as he had previously, that it would be he. Rather, he suggested that the Ambassador "ask Yanukovych," implying that his chances had slipped.

Comment

¶12. (C) If the High Administrative Court rules according to the election law, it could dispose of the Tymoshenko campaign's allegations of electoral fraud for good as early as February 18. There is thus a reasonable chance that Yanukovych's inauguration will take place on February 25 as scheduled. Tymoshenko appears intent on hanging on to her post for as long as she can. Regions, as Azarov noted, continues to have its work cut out in trying to get OU-PSD to defect and thus take down the Tymoshenko-led coalition. If this effort fails, the prospect of divided (Yanukovych vs. Tymoshenko) government and/or early parliamentary elections looms.
TEFFT